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IN THE

Supreme Court of the United States

October Term, 1965

PAUL R. SCREVANE, President of the City Council of the City of New York, and JAMES POWER and MAURICE J. O'ROURKE, Commissioners, Board of Elections, New York City,

Appellants,

—against—

JOHN P. LOMENZO, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, EUGENE H. NICKERSON, County Executive, Nassau County, FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, and JOHN R. CREWS and THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Defendants-Appellees,

and

JOHN H. HUGHES and LAWRENCE M. RULISON,

Defendants-Intervenors-Appellees,

and

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY,

Plaintiffs-Appellees,

and

ANTHONY J. TRAVIA and JOSEPH ZARETZKI,

Plaintiffs-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

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October Term, 1965

No. .....

PAUL R. SCREVANE, President of the City Council of the City of New York, and JAMES POWER and MAURICE J. O'ROURKE, Commissioners, Board of Elections, New York City,

Appellants,

—against—

JOHN P. LOMENZO, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, EUGENE H. NICKERSON, County Executive, Nassau County, FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, and JOHN R. CREWS and THOMAS MALLEE, Commissioners, Board of Elections, New York City,

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Plaintiffs-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Opinions Below

The order appealed from and the majority and dissenting opinions of the three-judge District Court below are not

reported. The order is annexed as Appendix A; the majority and dissenting oral opinions rendered on May 10, 1965, are annexed as Appendix B; the majority and dissenting oral opinions rendered on May 24, 1965, are annexed as Appendix C.

On June 1, 1965, the motion of plaintiffs-intervenors Travia and Zaretzki to accelerate their companion appeal from the May 24 order (Oct. T. 1965, No. 191) was denied, along with their application for a stay pending appeal. *Travia* v. *Lomenzo*, — U.S. —, 14 L ed 2d 480. Reapplication for such stay was denied on July 16, 1965.

On July 16, 1965 the application of plaintiffs-intervenors Travia and Zaretzki and the instant appellants, jointly, for a stay pending appeal from the July 13, 1965 order of the District Court was denied. (A copy of this order is annexed as Appendix D, and the District Court's oral opinion as Appendix E.) This appeal has not yet been docketed.

Related opinions of the New York State courts are *Matter of Orans*, 45 Misc 2d 616 (S. Ct. N.Y.), *aff'd*, 15 NY 2d 339 (April 14, 1965), *appeal pending*, Oct. T. 1965, No. 319, and *Glinski* v. *Lomenzo*, decided by the New York Court of Appeals on July 9, 1965. (A copy of the order of the Court of Appeals in *Glinski* v. *Lomenzo* is annexed as Appendix F, and a copy of its opinion annexed as Appendix G.)

Also pending are appeals by defendants Lomenzo, *et al.* (Oct. T. 1965, No. 81), and plaintiffs WMCA, *et al.*, defendant Nickerson and the instant appellants, jointly (Oct. T. 1965, No. 85), each appealing from a portion of the

January 26, 1965 order of the District Court, which stated that of the four apportionment plans enacted by the New York legislature in December, 1964, Plan A complies, and Plans B, C and D do not comply, with the Fourteenth Amendment.

The opinion of the District Court on which its January 26, 1965 order is based is reported in 238 F. Supp. 916. Its prior opinions are reported in 208 F. Supp. 368, 202 F. Supp. 741 and 196 F. Supp. 758. Prior opinions of this Court are reported in 379 U.S. 694, 377 U.S. 633 and 370 U.S. 190.

Jurisdiction

This proceeding was originally brought in 1961 under the Civil Rights Act, 42 U.S.C. §§1983, 1988 and 28 U.S.C. §1343, and 28 U.S.C. §§ 2201, 2202, to declare invalid under the Fourteenth Amendment the apportionment provisions of the New York Constitution (Article III, §§2-5) and the statute enacting an apportionment pursuant thereto (N.Y. STATE LAW §§121 and 123); and to restrain state officials from conducting an election thereunder. The complaint further prays that the District Court retain jurisdiction until such time as the Legislature, "freed from the fetters imposed by the Constitutional provisions invalidated by this Court, provides for such apportionment of the State legislature" as will insure plaintiffs the rights guaranteed them under the Constitution. Transcript of Record, *WMCA* v. *Lomenzo*, Oct. T. 1963, No. 20, pp. 11-12.

In *WMCA* v. *Lomenzo*, 377 U.S. 633 (1964), this Court held that the New York apportionment did violate the Fourteenth Amendment, and remanded to the District

Court for further proceedings consistent with the views stated in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), wherein this Court stated that the lower courts should attempt "insofar as possible" to accommodate the relief ordered to the apportionment provisions of the State's constitution. *Id.* at 584.

Appellants hereby appeal from a subsequent order by two judges of the three-judge panel, entered on May 24, 1965. It requires that an election of the New York Legislature be held in 1965, a date which contravenes the New York State constitution, on the basis of a legislative apportionment contained in a statute which the New York Court of Appeals on April 14, 1965 held invalid because it contravenes the New York State constitution.

Appellants' notice of appeal was filed with the clerk of the District Court on May 26, 1965.

Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §1253. The following cases, among others, sustain jurisdiction: *Hughes* v. *WMCA,* 379 U.S. 694 (1965); *WMCA* v. *Lomenzo,* 377 U.S. 633 (1964).

Questions Presented

The following questions presented by this appeal are also presented by the pending appeal in No. 191:

1. Did the District Court err in ordering the State of New York to hold an election of members of the New York State Legislature on November 2, 1965, on the basis of the provisions of Chapter 976 of the Laws of 1964 of the State of New York, which statute was held to contravene

the Constitution of the State of New York by the New York Court of Appeals in *Matter of Orans,* 15 NY 2d 339 (decided April 14, 1965)?

2. Did the District Court err in ordering that said election be held for an Assembly consisting of 165 members notwithstanding the fact that in *Matter of Orans, supra,* the New York Court of Appeals held, in the light of this Court's decision in *WMCA* v. *Lomenzo,* 377 U.S. 633, that Article III §2 of the Constitution of the State of New York continues to require that the Assembly consist of 150 members?

3. Did the District Court err in ordering that said election be held, notwithstanding the fact that the judgment of the trial court in *Matter of Orans, supra,* reported at 45 Misc 2d 616, held that Chapter 976 of the Laws of 1964 violates *prima facie* numerous rules contained in Article III §§ 4 and 5 of the State constitution relating to the drawing of district lines, including the rules that each senate district shall be in as compact form as practicable, and that each assembly district shall consist of convenient territory and shall be in as compact form as practicable?

4. In the light of circumstances which developed since February 1, 1965, did the District Court err in refusing to vacate its order of July 27, 1964 insofar as it directed that the terms of the members of the New York Legislature elected on November 3, 1964, or any special election subsequent thereto, shall expire on December 31, 1965, rather than on December 31, 1966, as required by the constitution of the State of New York?

5. Did the District Court err in refusing to order that during the year 1966 the members of the New York Legislature should vote by a system of weighted voting under a formula described by Judge Richard H. Levet in his oral opinion rendered herein on May 10, 1965?

The following questions presented by this appeal are also presented by the pending appeal in No. 85:

6. Did the District Court err in not considering or passing upon the question whether political gerrymandering can violate the Fourteenth Amendment of the United States Constitution?

7. Did the District Court err in not admitting proof or hearing argument that Chapter 976 of the Laws of 1964 is invalid as violative of the Fourteenth Amendment of the United States Constitution in that:

(a) it establishes districts which are not convenient and compact and which depart in a substantial and unreasonable manner from natural geographic and political subdivision boundaries; and

(b) district lines were deliberately designed to, and were adopted in such a manner as to, and do in fact systematically minimize the voting power of some persons in the state and unduly increase and maximize the voting power of other persons in the state?

8. Did the District Court err in not declaring that Chapter 976 of the Laws of 1964 is invalid as a violation of the Fourteenth Amendment of the United States Constitution?

Statement of the Case

After this Court held in *WMCA* v. *Lomenzo*, 377 U.S. 633 (1964), that the apportionment of the New York legislature violated the Fourteenth Amendment, the District Court on July 27, 1964 ordered that the term of the Legislature to be elected in 1964 be limited to one year, instead of the two-year term provided by state law. On appeal this Court affirmed, Justices HARLAN and CLARK dissenting. *Hughes* v. *WMCA*, 379 U.S. 694 (1965). Justices WHITE and GOLDBERG joined the affirmance:

> "since it is their understanding that it in no way interferes with the power of the District Court in the light of circumstances that may develop, to vacate or otherwise modify its order requiring an election in the fall of 1965."
>
> *id.* at 694.

The following circumstances developed since this affirmance:

(a) On March 15, 1965, the New York Supreme Court decided *Matter of Orans*, 45 Misc 2d 616, holding invalid all four apportionment plans contained in the Reapportionment Compliance Act (N.Y. LAWS 1964, Ch. 976, 977, 978, 979 and 981) on the ground that each plan provided for an Assembly of more than 150 members, in violation of Article III §2 of the State constitution, and that the assembly apportionment thus being invalid, the apportionment of the Senate necessarily falls with it (45 Misc 2d at 630-38). The court also held that the districting rules of the State constitution (Article III §§ 4, 5) are valid and subsisting and survive the condemnation of this Court's ruling in *WMCA*

v. *Lomenzo*, and that petitioner had proved *prima facie* that many districts in the Senate and Assembly violated one or more of the districting rules (*id.* at 638-55).

(b) On March 24, 1965 the order of the New York Supreme Court was filed. It adjudged the Reapportionment Compliance Act to be invalid and in violation of the State constitution. It retained jurisdiction:

> "for the purpose of entertaining such applications and conducting such further proceedings as any party may request or as may be appropriate in the light of further proceedings in these proceedings or in *WMCA, Inc.* v. *Lomenzo*, including (but without limitation) applications for injunctive or other relief as may be appropriate to give effect to this judgment * * *."

(c) On April 14, 1965, the New York Court of Appeals affirmed: "We hold to be in full effect the flat, positive and unmistakable command of the State Constitution that there be 150 members of the State Assembly. Since each of the four plans violates that command, each plan and all five statutes are invalid." 15 NY 2d at 345. The Court of Appeals expressly did not consider the lower court's determination concerning violations of the districting rules. See 15 NY 2d at 353-54.

(d) On May 12, 1965, the Legislature passed a bill (Ass. Int. 5695, Pr. 5988) providing for submission to the electors at the 1965 general election of the question "shall there be a convention to revise the constitution and amend the same?" pursuant to Article XIX §2 of the State constitution, and regulating the nomination and election of delegates if such question be decided in the affirmative. (This

bill became law [N.Y. Laws 1965, Ch. 371] when signed by the Governor on June 14, 1965.)

(e) On May 19, 1965 both houses of the Legislature adopted a resolution (Resolution No. 184) adopting, as the sense of the body, a program for temporary and permanent legislative apportionment, including (a) establishment of a bi-partisan commission to prepare a permanent reapportionment of the Legislature for the 1966 election on a non-political and constitutional basis; and (b) as a temporary measure, in lieu of the 1965 election mandated by the District Court's order of July 27, 1964, to provide for weighted voting during the 1966 legislative session by each member of the Legislature elected in November, 1964. A copy of this resolution is annexed as Appendix E to the Jurisdictional Statement in *Travia* v. *Lomenzo*, Oct. T. 1965, No. 191.

(f) On May 24, 1965, in accordance with the concurrent resolution of May 19, the Legislature adopted two bills: Ass. Int. 6050, Pr. 7066, establishing the bi-partisan reapportionment commission, and Ass. Int. 6051, Pr. 7067, adopting the weighted voting formula. (Both bills were vetoed by the Governor on May 27, 1965.) See Appendices F and H to the Jurisdictional Statement in *Travia* v. *Lomenzo, supra.*

Notwithstanding the invalidation of the apportionment plans enacted by the 1964 Legislature and the positive steps taken by the 1965 Legislature thereafter, the District Court, on May 24, 1965, entered the order here on appeal. It requires a 1965 election on the basis of Plan A, the apportionment plan contained in Chapter 976 of the Laws of 1964, one of the five statutes which the Court of Appeals held invalid as in violation of the State constitution.

Thereafter, on June 22, 1965 citizens of New York State brought a proceeding in the State courts (*Glinski v. Lomenzo*), which culminated in an order of the Court of Appeals dated July 9, 1965 enjoining the holding of a 1965 election on the basis of Plan A. See Appendices F and G. Finally, on July 13, 1965 the District Court entered a further order, reaffirming its order of May 24. See Appendix D.

The Substantiality of the Questions Presented

This appeal concerns the scope of the discretion of a federal court to fashion interim relief in a state apportionment case. Two central problems are presented:

(a) Whether it is within the discretion of a federal court to order a state election to proceed at a time and under an apportionment plan which the highest State court has held to violate the State constitution in respects not claimed to be violative of the Federal Constitution, when a number of more reasonable alternatives are available; and

(b) Whether it is within the discretion of a federal court to order a state election to proceed under an apportionment plan which is claimed to violate the Federal Constitution as a political gerrymander, without considering the evidence offered to support the claim.

The controversy has inevitable partisan overtones. In the 1964 election the Democratic Party unexpectedly gained control of both houses of the malapportioned State legislature for the first time since 1934. Its interests might have been served by elimination of the District Court's requirement for a 1965 election. Similarly, the interests of the Republican Party may be served by a 1965 election using

Plan A, it being one of the four alternative apportionment plans enacted at the "lame duck" session of the previous Republican-controlled Legislature, held in December, 1964.

(a)

The alternatives available to the District Court were reasonable and would have avoided the unseemly confrontation of federal and state power which its May 24 order has produced. *Cf. Scott* v. *Germano,* — U.S. —, 14 L ed 2d 477 (June 1, 1965).

The District Court should have modified its July 27, 1964 order to eliminate the requirement that an election be held in 1965, in the light of the circumstances that developed following this Court's affirmance of that order in *Hughes* v. *WMCA, supra.*

The circumstances that did develop certainly justified this course. The District Court previously had declared that three of the four apportionment plans enacted by the 1964 Legislature were invalid under federal law, without passing on their validity under state law. The New York Court of Appeals then held all four plans invalid as violative of a State constitutional provision which was not affected by this Court's "one man-one vote" rule. The Court of Appeals rendered its decision on April 14, 1965, less than two months before New York's election machinery was required to start functioning—June 1, the last day to notify boards of elections on positions. See N.Y. ELECTION LAW §18.*

Following the Court of Appeals' decision and before the District Court acted on May 24, the State legislature had taken substantial steps to afford both interim and permanent relief.

---

* N.Y. LAWS 1965, Ch. 412, approved by the Governor on June 21, 1965, extended this date to June 22.

On May 12 it passed a bill to place in the ballot at the 1965 election the referendum on holding a constitutional convention, the necessary first step to hold such a convention under the procedure required by the State constitution (Art. XIX § 2). If the vote is "yes" on the referendum, the convention will be empowered to adopt an apportionment plan which, if approved by the voters, will go into effect at the 1968 election.

On May 19 the Legislature adopted a concurrent resolution expressing its support for a proposed reapportionment program, and on May 24 it passed two bills to implement this program. One established a bi-partisan reapportionment commission to prepare a non-political apportionment conforming to state and federal law for adoption by the Legislature to take effect at the 1966 election. The other adopted as an interim measure a method of weighted voting to govern the 1966 session of the existing malapportioned Legislature.

As a second alternative, the District Court could have directed that the 1965 election be held, but using the existing apportionment plan and requiring that the members of the Legislature so elected vote by a weighted voting formula during their one-year term. This was the proposal of the district judge who dissented from the May 24 order.

As a final alternative, the District Court could have appointed a special master to prepare a plan conforming to state and federal law, to be used for an election in 1965. This was the solution first urged by plaintiffs at a hearing on March 22, 1965, following the lower court's decision in *Matter of Orans, supra.*

The District Court rejected all the alternatives proposed. It refused to eliminate the requirement of a 1965 election. At the May 24 hearing it noted that by May 10 the Legislature "had not even approached enactment of another apportionment scheme" (Appendix C, p. 15a, *infra*) and stated: "We are loathe to reward the present members of the Legislature for their inaction by granting them another year in office, even under a scheme of weighted voting." *Id.* p. 16a.

It refused to appoint a special master:

> "* * * We can hardly conceive of a greater interference with the process of self-government than for us, a three-judge United States District Court, to impose on the citizens of New York State, a districting plan which has never been enacted by their own elected representatives. Such a course of action should be saved only for circumstances in which there is no viable alternative."
>
> (*id.* p. 17a)

And it rejected holding the 1965 election under the existing apportionment, but using weighted voting. It surmized that weighted voting violated the New York constitution (*id.* pp. 18a, 19a) and found objectionable the fact that weighted voting "would produce a disparity in voting power of 21:1 between Assemblymen from the largest and smallest districts" (*id.* p. 18a).

The order of May 24, 1965 has compelled the state authorities to act in a manner which violates the New York constitution, with respect to matters which in no way conflict with overriding federal policy. The time, place and manner of holding an election of a state legislature is ex-

clusively within the power of a state to regulate, so long as such regulation is on a non-discriminatory basis. *Pope* v. *Williams*, 193 U.S. 621 (1904); *see Carrington* v. *Rash*, 380 U.S. 89, 91 (1965); *Lassiter* v. *Northampton Bd.*, 360 U.S. 45, 50-51 (1959). The District Court itself stated that legislative apportionment is "a matter of the utmost sensitivity and importance to the people of the State of New York." 238 F. Supp. at 922. This Court expressly recognized that "A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme." *Reynolds* v. *Sims*, 377 U.S. at 578. Its opinion in *WMCA* v. *Lomenzo* discusses in detail the rules in the New York constitution (Art. III §§4, 5) which prescribe for the Legislature the method of drawing district lines, including a requirement that districts be compact and contiguous. See 377 U.S. at 646-47.

Yet the apportionment plan which the District Court has compelled New York to adopt not only violates the State constitution with respect to the size of the Assembly and doubtless the Senate also, *see Matter of Orans*, 15 NY 2d at 351, but also violates on a wholesale basis its salutary anti-gerrymandering rules for drawing district lines. See *Matter of Orans*, 45 Misc 2d at 638-55.

Among other things, Plan A does not comply with the rules for balancing the populations of adjoining districts within a county. As a result, the District Court in effectuating this Court's "one man-one vote" rule has mandated districts of less equal population than those required by state law.

And under the circumstances, including the Legislature's action adopting a weighted voting formula to govern the 1966 legislative session, the District Court's mandate that an election be held in 1965, in violation of the State constitution, is a clear abuse of discretion.

The 1965 election is unnecessary on federal grounds. The interest of plaintiffs in obtaining immediate relief from the present malapportionment would have been fully served by the weighted voting procedure the Legislature adopted.

The District Court's stated desire not "to reward" the Legislature for failing to enact a new apportionment during the time elapsed from April 14 to May 24 furnishes no proper basis for directing an election expressly violative of State constitutional provisions. Moreover, the Legislature's inability to enact a new apportionment in the limited time available did not warrant such "punishment."

The District Court's doubts about the status of weighted voting under the New York constitution are an inadequate basis for rejecting the Legislature's proposal: "we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). And such doubts are apparently unfounded. In *Glinski* v. *Lomenzo, supra*, three judges of the New York Court of Appeals expressly endorsed weighted voting as a temporary measure to comply with the requirements of the Federal Constitution, and the remaining judges expressed no opposition to it. See p. 40a, *infra*.

Any power of the District Court to act as it did must derive from 28 U.S.C. § 2283, a statute "designed to prevent conflict between federal and state courts." *Leiter*

Minerals v. *United States*, 352 U.S. 220, 225 (1957); see *Clothing Workers* v. *Richman Bros.*, 348 U.S. 511 (1955).

In *Reynolds* v. *Sims*, this Court gave an explicit direction to lower courts in fashioning relief from malapportionment:

> "Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of the state constitutions insofar as possible."
>
> *Reynolds* v. *Sims*, 377 U.S. at 584.

It is submitted that the District Court's May 24 order plainly violates this Court's direction. To the extent that it enjoins state court proceedings, it equally plainly constitutes an abuse of the power conferred by 28 U.S.C. §2283.

(b)

The questions as to whether an apportionment plan based primarily on political gerrymandering can under certain circumstances violate the Fourteenth Amendment are clearly substantial. Gerrymandering, like malapportionment, is capable of producing an apportionment scheme which "would operate to minimize or cancel out the voting strength of * * * political elements of the voting population." *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965). The District Court plainly erred when it ruled that the Equal Protection Clause extends only to instances of racial gerrymandering, and therefore refused even to consider the proof offered that Plan A was designed to minimize the voting strength of political elements of the voting population. See 238 F. Supp. at 925-26.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted, the order appealed from should be vacated, and the cause remanded.

New York, N.Y.
August 3, 1965

Respectfully submitted,

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APPENDIX A

May 24, 1965 Order of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civil 1559

WMCA, INC., et al.,

Plaintiffs,

—against—

JOHN P. LOMENZO, Secretary of State of the State of New York, et al.,

Defendants.

Before:

HON. STERRY R. WATERMAN,

Circuit Judge.

HON. SYLVESTER J. RYAN,
HON. RICHARD H. LEVET,

District Judges.

Upon the Notice of Application of the Attorney General of the State of New York, dated April 19, 1965, for such further order in this action as may be deemed necessary or appropriate by the Court for the implementation of its orders of July 27, 1964 and of January 26, 1965, as resettled by its order of February 16, 1965, and upon the proceedings in open court on May 10, 1965, and all papers submitted with respect to said hearing,

Appendix A—May 24, 1965 Order of District Court

IT IS HEREBY ORDERED THAT:

1. An election of members of the New York State Legislature shall be held on November 2, 1965, provided that the terms of the members so elected on that date or at any special election to fill vacancies, shall expire on December 31, 1966.

2. Though the purported statute is itself presently ineffective, the scheme set forth in the Reapportionment Compliance Act, Chapter 976 of the Laws of 1964, together with such clerical corrections as have been certified to us by the Secretary of State pursuant to our order of May 10, 1965, in accord with the procedures set forth in §403 of said ineffective Act, shall form the basis for the election of members of the New York State Legislature at the general election on November 2, 1965 and for any primary contest to nominate candidates for the Legislature or for any special election to fill vacancies prior to December 31, 1966. There is attached hereto and made a part hereof copies of the Act and the certified clerical corrections.

3. Jurisdiction of further proceedings which may be found to be necessary in this Court is retained.

Dated: New York, New York
May 24, 1965

/s/ STERRY R. WATERMAN
U. S. Circuit Judge

/s/ SYLVESTER J. RYAN
U. S. District Judge

.....
U. S. District Judge

APPENDIX B

Oral Opinions of District Court, May 10, 1965

Judge Waterman: Anyone wish to say anything further? This was the arrangement we had, that he would end, but he may have said something that someone else wishes to comment on.

(No response.)

Judge Waterman: All right, gentlemen.

The Court has made up its mind, as I think you know.

Back on July 27th we permitted a mal-apportioned Legislature to be elected on a mal-apportioned base and a mal-apportioned Legislature to meet in special session. This would almost seem to be the limit, that one would expect this Court to permit a mal-apportioned Legislature to attempt legislation in this state.

We said back in July that the mal-apportioned Legislature which we were permitting to be elected would have a term which would expire on December 31, 1965, and we provided that not later than April 1st of this year the legislature shall have enacted into law a valid apportionment scheme that is in compliance with the Fourteenth Amendment of the United States Constitution and which shall be implemented so as to effect the election of members to the Legislature at the election in November, 1965, members so elected to hold office for a term of one year, ending December 31, 1966.

Then, at a subsequent hearing, as you all know, we extended the time within which that order could be complied with until May 5th, which was five days ago.

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Now in the meantime a legislature did pass an act which we have held did and does comply with the Fourteenth Amendment of the United States Constitution, and a subsequent mal-apportioned Legislature has had since the date of its convening early in January until to date an opportunity to replace what the mal-apportioned Legislature of December of 1964 did, and thus far has accomplished nothing, in spite of the extension of time which we granted from April 1st to May 5th, and a further extension of time in fact until today.

All three of us are of the opinion that there is no point in any further delay with respect to holding an election to elect members of the general Assembly and Senate for the year 1965. Whether there is some purpose in taking away from the duly elected people, duly elected representatives of the people, the right which we wish they would exercise and which we have given them every opportunity to exercise with respect to the Legislature which will be elected in 1966 is, of course, another question.

But as of today a majority of the court is ordering that its previous orders be complied with forthwith, and that Plan A will form the basis for the election of members of the Legislature who will hold office for one year, the year 1966, the calendar year, or whenever, and will be elected on November 2, 1965. The machinery of the election process which you gentlemen have told us about so often can therefore begin to operate.

Caveat: The Court will not issue an order until such time as it can see Plan A in its perfect form. Well, I won't say that. The Court will not implement its order until it can see Plan A in a perfect form, perfected form, and we

give you—how much time did you say? Ten days? I have heard these dates before.

Mr. Zimmerman: Ten days will be splendid.

Judge Waterman: All right, ten days, to see Plan A with all of its minor difficulties straightened out. Please submit it to other counsel also.

Order and opinion, if necessary, will follow in due course.

There is a suggestion we reserve jurisdiction. I don't know anything else we can do.

(Pause)

Judge Waterman: Monday, May 24th, at 10.30 in the morning. You are given, gentlemen, through the 19th in which to straighten out these details and submit copies of the changes to all counsel of record, and they have and you have until the 24th at 10.30 in the morning.

Of course we are not restraining the Legislature from doing anything it can do in the meantime.

Judge Ryan: Nor the Governor.

Judge Waterman: And we aren't restraining any other coordinate branch of the federal government or any of the three branches of the state government, any more than we have at any time restrained action.

Are there any further questions?

Mr. Judd: Should we submit—

Judge Waterman: Just a moment. I spoke for the majority of the court. I want Judge Levet to speak now.

Judge Levet: I want this to stand on the record. I regret that I have to dissent from my brothers on this panel and this is the first time.

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I am in accord with everything except that I do not agree with the designation of Plan A, either the unadulterated or the reformed version, and I shall state briefly why:

In March, 1962, the United States Supreme Court decided the basic case on reapportionment, Baker vs. Carr, 369 U.S. 186.

On January 11, 1962, this Court dismissed the complaint in WMCA vs. Simon, 202 Fed. Supp. 741.

In June, 1962, the Supreme Court vacated that dismissal and remanded the case to the district court for further consideration in the light of Baker vs. Carr. After remand this three-judge court again held that the New York State apportionment laws then existing were valid, WMCA vs. Simon, 208 Fed. Supp. 368.

On June 15, 1964, the Supreme Court reversed WMCA vs. Lomenzo, 377 U.S. 633, and again remanded to the district court for further proceedings consistent with the Supreme Court's opinion in WMCA vs. Lomenzo, supra, and Reynolds vs. Sim, 377 U.S. 533.

In Reynolds vs. Sim the Supreme Court stated, I quote:

> "State constitutional provisions should be deemed violative of the federal constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions in so far as possible."

At a special session of the Legislature held in December, 1964, four apportionment acts were passed, each of which

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provided for more than 150 members of the Assembly. These plans were denoted as Plans A, B, C and D.

On February 1, 1965, this Court held that Plans, D, C, and B were each invalid and that Plan A was valid, 238 Fed. Supp. 916.

However, in a proceeding entitled "In the Matter of the Petition of Jerome T. Orans", Honorable Matthew M. Levy, Justice of the Supreme Court, New York County, held that Plan A violated the provisions of the New York State Constitution with respect to the number in the Legislature that is in the assembly. I haven't the citation in Misc. 2d. This decision, of course, was affirmed in the Court of Appeals in an opinion written by Chief Judge Desmond dated April 14, 1965, not, I believe, yet reported.

The time fixed by this court for the submission of a valid apportionment plan was April 1, 1965, by order of July 27, 1964. That was later extended to May 5th. On May 5, 1965, the joint legislative committee on reapportionment filed a tentative Assembly apportionment plan. No plan for the Senate apportionment was submitted, no bill has been submitted, no act has been passed.

The time now remaining before the primary elections is such that the procedures for 1965 election must commence on or about June 1, 1965.

Determination of district lines is necessary in order to permit a basis for designating petitions, revision and enrollment books, and so forth. This time fixed by this court has expired.

In spite of protestations by various parties concerned, no legally authorized plan has been enacted and it is apparent that none will be enacted by the required date.

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In the papers presented to this court the plaintiffs advocate the appointment of a Special Master. The Attorney General recommends that the court temporarily utilize Plan A, which provides for 165 Assemblymen.

Now, in view of Reynolds vs. Sims it is my opinion that recourse to Plan A is improper and I say that with due respect to the opinions of my brothers on this court, and I myself vote for another procedure, that is, weighted voting.

Weighted voting has been considered by numerous courts. I refer to a number of cases and I will not bore you with any readings from them.

I refer to one which is familiar to me and which is familiar also to Judge Waterman, Musicians Federation vs. Wittstein, 379 U.S. 171 in 1964.

I will read from Justice White's opinion in that case; and that was a case involving the vote at a national convention of musicians, where there were some 280,000 members represented, and I think delegates of some twelve to fourteen hundred.

There Mr. Justice White said, I quote:

> "The pervading premise of both these titles is that there should be full and active participation by the rank and file in the affairs of the union. We think our decision today that the vote of an elected delegate may reflect the size of his constituency is wholly consistent with that purpose."

Now weighted voting has been considered by various courts and has never been fully buried. It has been criticized but not convicted. In Asbury Park Press, Inc. vs. Wooley, 31 New Jersey 1, 161 Atlantic 2d 705, League of

Nebraska Municipalities vs. Marsh, 209 Fed. Supp. 189, Maryland Committee for Fair Representation vs. Tawes, 228 Maryland 412, 180 Atlantic 2d 656; Thigpen vs. Meyers, 231 Fed. Supp. 938, and to some extent Lucas vs. Colorado General Assembly, 377 U.S. 713.

It is my opinion that no interim plan should be based upon a form of legislative plan which violates the New York State Constitution. I am opposed to the use of Plan A.

I do not believe that this court should require a temporary use of a plan which is contrary to the state constitution and which has been so held by the highest court of this state.

Moreover, it seems to me that it is contrary to the general directions of the United States Supreme Court in the Reynolds vs. Sims case which I quoted.

It is not necessary to change the number of the legislators in order to arrive at a solution of the basic apportionment demands of the Supreme Court decision. The use of weighted voting has been approved in certain courts, at least as a temporary solution.

Moreover, Nassau County has utilized a system of weighted voting without serious difficulty. See the article by Professor and County Attorney Jack B. Weinstein in 65 Columbia Law Review 20, page 44. There are also other quotations from the same article which seem to approve this as a stop-gap solution.

Now the formula is an easy one. It doesn't require any computers. It can be done by the simplest form of arithmetical equation. I did it myself, so it must be simple.

You simply have an equation which is as follows:

Population of the state as of 1960 over population of the

district equals 150 over X. Solve that equation for X and you get the vote of this individual.

Now the Attorney General and his associate took a whack at weighted voting, but an unnecessary, unfair crack at it. I think, Mr. Judd, because you assumed in your brief that you would have one vote for Schuyler County and that the others would be built up from that. That is not what I mean, at least, by weighted voting.

Now, as I say, this is a simple formula. It may be computed for each one of the 150. A chart may be prepared in the Legislature when the vote is counted. All they need to do is to add up the votes and it is there. This may be, to some extent at least, somewhat contrary to the state constitution but it doesn't violate any other arrangement in the state constitution. It isn't necessary to change the numbers, as I said, to secure this basic element which the Supreme Court has declared proper. And I believe personally that it is the only way of effectuating the decisions of the United States Supreme Court and I believe that no further delay should be permitted. I think that this is the proper solution.

I do not see how the Attorney General or anyone else can contend that the doctrine of judicial supremacy of the federal court can force the State of New York into what is apparently and has been held by the highest court of this state an unconstitutional provision, whereas a modification here going to the essential thrust of the Supreme Court decisions is necessary and would be warranted under a temporary regime.

Judge Ryan: It would serve no purpose for me to detail why I concur in every respect with the views expressed by

my colleague Judge Waterman today. If occasion requires further comment, at the time a written opinion is filed I will file it. At this time I see no need for it.

Mr. Judd: Your Honor, the question I want to raise is whether for the hearing on the 24th we should submit an order giving effect to what your Honor stated is the direction of the court.

Judge Waterman: You should do more.

Mr. Judd: Submit it beforehand to counsel.

Judge Waterman: You should circulate it.

Needless to say, this court, after four years, would hate to see this case get out of its hands, and we retain jurisdiction.

If there is anything that we can do to facilitate anyone going to the Supreme Court of the United States at any time, we will do all we can to assist.

Judge Ryan: It seems to me, however, that the taxpayers are entitled to a little consideration in this whole picture. This calling for election every year of the Legislature is an expensive proposition. The maintenance of a legislature costs considerable thousands of dollars. Our taxes are being raised every day. The people are entitled to have the Legislature take affirmative action upon this problem.

Judge Levet: I will concur with that.

Judge Waterman: We all concur in that statement.

(Adjournment taken at 12.25 p.m.)

APPENDIX C

Oral Opinions of District Court, May 24, 1965

Judge Waterman: Judge Rifkind, the three of us, no matter how we might split on other things, are not going to vary our order that "There shall be an election this year".

Mr. Rifkind: I have heard you say that, but that does not necessarily cause me to change my view.

Judge Waterman: I am not saying that all the officers who deal with elections cannot be restrained by the State Court action or otherwise, but so far as this court is concerned—moreover, I am not saying that we may not be overturned by a higher court than ourselves—but as far as this court is concerned, there shall be an election in the year 1965.

Mr. Rifkind: So I have heard this court say, and I have heard it said, and I am of course submissive to its views, but I respectfully suggest that when you retire to your chambers you consider not that there shall be an election, but how shall be carried out the purpose of the Supreme Court in WMCA v. Lomenzo. And if you come to that conclusion, you may well come to the conclusion that the holding of an election is an obstruction to that purpose and not a means of bringing it out.

Judge Waterman: It may well be.

Now, so far as your complaint is concerned that we have permitted you to file as an intervenor, we unanimously deny A. We unanimously deny B, and so far as—

Judge Levet: That is correct. I concur in that.

Judge Waterman: As to C, we are split, and you will have to wait until we make an announcement.

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So far as the County of Nassau is concerned, we accept the statements made by the Attorney General that the matter which you would have us attend to now has been properly taken care of through administrative channels and can continue to be properly taken care of in administrative channels if there is some misunderstanding about it.

Your request that we make an order that you may go to a State Court if you wish is quite immaterial to us. We have never stayed anybody from going into a State Court, and we do not intend to continue the stay. If it creates chaotic conditions, it is not our fault.

Judge Ryan: We do at this time approve the corrections made by the Secretary of State.

Judge Waterman: Oh, yes. It is part of our order.

Judge Ryan: I think we should make that clear.

Judge Waterman: As you will see when we file our order, in case you did not get a copy of it, we have approved the corrections made by the Secretary of State insofar as they were made.

I really think it unnecessary for anyone on the court to make any statement, but at the risk of boring you, we will make additional statements in addition to the statements we made on May 10th.

We do not propose to review the checkered history of this case nor the varying positions taken from time to time by the different parties on it.

On the subject of weighted voting, I might say that I myself have reviewed the different positions taken by the different parties since July of 1961 on the issue of weighted voting, and I find it very enlightening.

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Now, I will say this: On June 15, 1964, the United States Supreme Court held that New York's scheme of legislative apportionment was in violation of the Equal Protection Clause of the United States Constitution. WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964). Upon remand of the case to this court for further proceedings, after notice to the parties and after hearing, we issued our order dated July 27, 1964, which decreed in part as follows:

> "The 1964 election of Assemblymen and Senators shall be conducted as presently scheduled; provided that the terms of said Members so elected on November 3, 1964, or at any special election to fill vacancies, shall expire on December 31, 1965, and providing further that not later than April 1, 1965, the Legislature shall have enacted into law a valid apportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965, Members so elected to hold office for a term of one year ending December 31, 1966."

Our order was affirmed by the United States Supreme Court on February 1, 1965. Hughes vs. WMCA, Inc., 379 U.S. 694 (1965).

As Judge Rifkind has pointed out—and I will add to what he has said—the decision was a 7 to 2 decision, two justices dissenting altogether, and two of the seven, Justices Goldberg and White said specifically their assent in the court's opinion was occasioned by the fact that they knew

that this court—our court here—could change that order if we wished to change it.

Meanwhile, on December 22 and 23, 1964, the New York State Legislature enacted a Reapportionment Compliance Act, N.Y. Laws 1964, ch. 976, 977-78, 979, 981, consisting of four alternative schemes of legislative apportionment. Upon additional proceedings in this court, after notice and hearing, we submitted a decree dated January 26, 1965, which declared that three of the plans were in violation of the Equal Protection Clause, but that the fourth plan, N.Y. Laws 1964, ch. 976 (Plan A), complied with our prior order. WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (SDNY 1965). A resettled order was filed on February 16, 1965, enjoining defendants from effectuating the invalid apportionment schemes.

On March 15, 1965, Justice Levy of the New York Supreme Court held that Plan A was in violation of the New York State Constitution because it enlarged the size of the Assembly beyond 150 members. In the Matter of Orans, 45 Misc. 2d 616 (Sup. Ct. 1965). In order to give the Legislature time to enact another apportionment scheme that would comply with both the Federal and State Constitutions, we extended our deadline for legislative reapportionment from April 1, 1965 to May 5, 1965. Justice Levy's decision was affirmed by the New York Court of Appeals on April 14, 1965. In the Matter of Orans, 15 N.Y. 2d 339 (1965).

On May 10, 1965, the Legislature had not even approached enactment of another apportionment scheme. Consequently, after notice and hearing, we decreed on

that day, by a vote of 2-1 that "Plan A will form the basis for the election of members of the Legislature who will hold office for one year, the year 1966, . . . and will be elected on November 2, 1965." We gave the State ten days to correct minor descriptive errors in Plan A and to settle our decree upon notice, and we added that "of course we are not restraining the Legislature from doing anything it can do" prior to a hearing upon the settled decree, which was set for May 24, 1965.

We three judges agree that 1965 is the last year in which we will permit a malapportioned legislature to govern the State of New York. We have given the Legislature almost ten months to comply with the Federal Constitution; equal protection of the laws can no longer be delayed. See Reynolds v. Sims, 377 U.S. 533, 585 (1964). We are also agreed that there must be a legislative election in November, 1965, pursuant to our original order which was affirmed by the United States Supreme Court. We are loathe to reward the present members of the Legislature for their inaction by granting them another year in office, even under a scheme of weighted voting. (Also see our discussion below of weighted voting.)

Nor can we wait any longer for the Legislature to enact a constitutional redistricting statute. The current deadline for setting in motion the state election machinery is June 1, 1965, the last day on which County Chairmen may notify Boards of Election of positions to be filled; and it is conceded that the clerical task of revising voter rolls in election districts ought to begin forthwith, in the interests of assuring efficient party primaries. See Reynolds v. Sims, supra

at 585. Even if these processes could be delayed for a brief period of a day or two without undue harm except last-minute confusion, the Legislature has given us no ground for hope that the additional time would result in the enactment of a statute redistricting for the election in November, 1965, which would provide for 150 Assembly districts so constituted that we could find the statute, after notice to the parties and hearing after notice, not violative of the Equal Protection Clause, in order that the citizen voters in the large urban and suburban areas of the state who have been invidiously discriminated against have an equality in the Legislature, which the Legislature by its own inaction has denied to these urban and suburban voters.

No one proposes that we order the election in November, 1965, to be held at large. Such a scheme would produce extraordinary confusion in a state the size of New York. Our entire court is also resolved against appointing a special master to recommend a new districting plan for the election to be held in November, 1965. When we issued our order on May 10, 1965, there was no guarantee that a master, if appointed, would finish this complex task in time to avoid disruption of the state election machinery. More importantly, we can hardly conceive of a greater interference with the process of self-government than for us, a three judge United States District Court, to impose on the citizens of New York State a districting plan which has never been enacted by their own elected representatives. Such a course of action should be saved only for circumstances in which there is no viable alternative. See Reynolds v. Sims, supra at 586.

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We are forced to choose, therefore, between an election under Plan A and an election under the present districting scheme which the United States Supreme Court held to be violative of the Equal Protection Clause, but with weighted voting. It is true that Plan A has been declared invalid under the New York State Constitution because it enlarges the size of the Assembly from 150 to 165 members. At a prior hearing of our court, however, plaintiffs argued in a plausible fashion that the New York State Constitution likewise forbids any deviation from the rule of one legislator—one vote. WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 920-21—And this morning it seems to be in the air here that the New York State Constitution, if challenge is brought into the New York State Courts about it—the Court of Appeals would also believe that the State Constitution forbade any deviation from that rule.

In this case, if weighted voting were authorized, it would produce a disparity in voting power of 21:1 between Assemblymen from the largest and smallest districts, according to 1960 citizen census figures. WMCA, Inc. v. Lomenzo, 377 U.S. 633, 648 (1964).

Since at this point I am talking only for Judge Ryan and myself and not for Judge Levet, I will interpolate:

For example, the Supreme Court of the United States in WMCA v. Lomenzo, 377 U.S. 633 at 650-651, highlighted the disparities in the citizen population of three of the present Assembly districts, one in Nassau County, with a citizen population of 314,721; the Schuyler County district, with a citizen population of 14,974, and one in Monroe County with a population of 190,343.

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Accepting the proposed weighted voting formula of using as a numerator the 1960 citizen population of the present Assembly district represented by these three members and the denominator being the quotient obtained by dividing the total 1960 citizen population of the entire state by 150, we arrive at the following:

The Nassau Assemblyman would have 2.913 votes or almost three full votes. The Schuyler Assemblyman would have .138 of one vote, or something between 1-7th and 1-8th of a vote. The Monroe Assemblyman would have 1.758 or roughly one and three-quarters of a vote.

Surely, these examples demonstrate the inefficiency of the solution—even as a stopgap—of the proposed solution of Senator Zaretzki and Assemblyman Travia, who intervened today. On the chance that weighted voting violates the New York State Constitution, we view it as a much more serious infringement on the public policy of the State of New York than the enlargement of the size of the Assembly by a mere fifteen members, each of the 165 Assemblymen representing a district of approximately equal citizen population.

It is also true that if we order an election under Plan A for November, 1965, but not for November, 1966, the State of New York will have to hold three legislative elections in three successive years under three different districting plans. No one pretends, however, that weighted voting will not present its own practical difficulties, by encumbering and distorting the legislative process. Indeed, the prospect of these practical difficulties has deterred all other courts grappling with legislative malapportionments from effec-

tuating, even as a temporary remedial device, legislative elections complicated by provisions granting different weights to the votes of different legislators.

The District Court in the State of Washington did make such an order but never effectuated it because the Legislature took care of the situation. Other than that one court I know of no other court that has even attempted it.

Now, what are the advantages, if any, in adopting Plan A?

The great advantage of adopting Plan A rather than the present districting plan with weighted voting is that Plan A fully complies with the Equal Protection Clause whereas weighted voting does not. In WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 923-24 (SDNY 1965), we ruled unanimously that a scheme of fractional voting, whereby most of the Assemblymen would cast a full vote, and the remainder would cast fractions of a vote ranging from 3/4 to 1/6 according to the population of their districts, did not furnish equal protection of the laws to citizens of New York State.

This flaw is exacerbating to us and is further made more acute in a scheme of weighted voting which involves this tremendous disparity of 21:1 between the 1960 citizen population of the largest district in Nassau and the smallest district upstate and a comparable disparity in voting power between the Assemblymen elected from such invidiously disparate electorates.

Accordingly, we have ordered that a legislative election be held under Plan A on November 2, 1965, members so elected to hold office for terms of one year. Because Plan A violates the New York State Constitution, however, we make no order beyond this one. Therefore, we expect the

parties to this suit to present to us reasoned proposals by which the citizens of New York State may obtain permanent legislative apportionment which complies with both the Federal and the State Constitutions. We retain jurisdiction to entertain such proposals.

We are very happy to learn today that there may be a commission, non-political in nature, provided for to begin the study of this matter promptly and that there may be legislative acts which will meet the constitutional tests under both constitutions to provide for some implementation for the election to be held the year following this.

This court will be available during the first two weeks of June, and we will be available, as we have been in the past, at different times whenever orders to show cause or motions may be filed, to assist in any way that we can.

We reserve the question of the master method for the election for the year succeeding the present year. We take no position on it at the present time.

I have nothing more that I wish to say.

Judge Ryan: I concur.

Judge Levet: I want to put this on the record—

Judge Waterman: Judge Ryan and I for a majority of the court deny your paragraph D.

Judge Levet: I must dissent, even though I am alone.

Obviously, all of us, I think, agree with the statement of Judge Rifkind that this has been a cataclysmic set of events of seismographic dimensions in its effect upon the political structures of states and, to some extent, on other subordinate bodies.

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I concur in part, as has been indicated, with the majority opinion, first in the decision to require an election in 1965 for the year 1966; second, in the general determination not to continue the present distribution of legislative voting power, in other words, that an attempt must now be made to remedy the status heretofore declared by the Supreme Court in conflict with the 14th Amendment.

Third, I agree that there should be no election at large.

Fourth, I agree, at least at the present time, that there should be no special master appointed.

However, I respectfully disagree with the temporary remedy proposed by the majority of this court, and, as you can see, there have been no conversions.

On May 10, 1965, I stated my reasons for dissent from the majority's directive for the use of Plan A for the year 1966. I recapitulate in brief, and I augment briefly:

First, Plan A has of course been declared unconstitutional as to the number of legislative membership. See the Orans case, decision by Chief Judge Desmond, 14 N.Y.S., 39.

Second, Judge Matthew Levy indicated in his opinion that there was clear evidence of gerrymandering in that plan. See Orans 25 Misc. 2nd 616.

Thirdly, to correct a legislature of an improperly based membership is unwise, since adoption will create future difficulties of expansion and contraction and might leave a void for the 1965 election.

It is my opinion that the 14th Amendment gives no possible power, no basis for this court to suspend the valid provisions of the State Constitution unless directly necessary to obtain the results demanded by the governing deci-

sion by the Supreme Court affecting legislative apportionment in this state.

I agree with Judge Rifkind and his general assertions and arguments along that line.

Whether the Federal Courts should mould their decrees in equity so that the constitutional provisions of the State of New York with respect to composition, not the apportionment or districts, shall be observed is the issue presented to this court. Even the temporary adoption of Plan A by order of this court violates what I believe to be a basic principle governing the relationship of states and nation under our Federal Constitution.

Moreover, equitable remedies are limited to the relief required and should be tailored to necessity rather than to convenience.

I thus dissent to the remedy provided. I adhere to my vote for weighted voting of legislators elected under the present districts which have been approved heretofore, both in the Assembly and in the Senate.

No firm determination is now possible in order to secure any adjudication of any revision of the districts.

At a time soon enough for the election procedures of a 1965 election, voting for the 150 Assemblymen and some 50-odd Senators at large is confusing and impractical. Retention of the present voting power would be unwarranted and illegal.

The use of weighted voting as I described it, and apparently in general, at least, without approving the exact details—my statements are somewhat academic along this line by now—as proposed by Judge Rifkind here and his

clients, has some disadvantages, but it is the lesser of the evils.

Weighted voting by committee members is unnecessary, since the real test is the final enacting vote.

Some of the opponents of this method—and I do not refer to my colleagues—set up straw bugaboos and then knocked them over. For example, recently, counsel for the Mulligan Commission, a good friend of mine, Thomas B. Gilchrist, Jr., in addressing some of the voters of Westchester County, said the plan would gum up the committee system. Well, all I can say in reply to that is that the gum is imported.

Now, we have here today, and I wish to thank them, the two representatives from the universities, one a political science teacher from the University of Rochester and the other a member, I believe, or editor of the Columbia Law Review, whose material we have received here.

The first article, which is from the Rutgers Law Review, was written by John F. Bansoff III and was submitted here to us. I have read it.

Now, the principal arguments of this are twofold. One, it is said that districts with small voting power cannot defeat bills supported by those with large voting power. I assume that that was one of the purposes of the decision in Washington, WMCA v. Lomenzo.

Secondly, it is asserted that one representative with, say three votes or 2.9, whatever it is, will not split his vote.

Now, with due respect to the academic world, I wonder whether they have ever heard of caucus votes. I have.

Now, the other article, written by Professor Riker of the

University of Rochester, contains a technical discussion with all sorts of formulae to illustrate possible but not probable or likely defects of this method. The statement is made that one of the plans submitted by the Legislature carried fractional voting or weighted voting or weighted voting, whichever term was used, and to compare that with the proposed plan is not sound. That plan, as I recall the legislative enactments, provided for one vote for the least populated districts, such as Schuyler County—am I wrong, Mr. Zimmerman?

Mr. Zimmerman: One-sixth.

Judge Levet: One-sixth vote. Well, whatever it is, it makes no difference in the last analysis. Obviously, if there is a county with a certain population and another county with a population of 21 times that, there is no basic reason why the more populous county should not have the more effective vote.

That again, I say, is one of the purposes of the decision of the Supreme Court.

All in all, then, I do not believe that the possible constitutional invalidity of this method is important. I think that to adopt Plan A and to reject this is to strain at a gnat and swallow a camel, if I may say so, with all due respect.

The collision involved between Plan A and the Constitution of the state is clearcut, decided. It is in effect determining the number of the legislators of this state. On the other hand, the collision between this weighted system and the State Constitution obviously must be accepted if there is a direction for it, because it does not, unlike Plan A, result

in the Federal Government dictating a term of a temporary state constitutional organization.

Now, I say this without intending to be cynical and without intending to be critical and with some degree of, shall I say, distant knowledge about politics. We have here what some people might have called what Judge Frankfurter called a political thicket.

There is nothing wrong with politics. Politics is a means by which the wishes of the people of a state or any unit are validly effectuated and without any indication of what the present situation means from that standpoint, I note the attempts, at least, even though they may be belated, to do something about this, and I believe that the emergence from this condition which faces this state can only be remedied with the cooperative statesmanship of the leaders of the State Legislature.

I therefore dissent as to the remedy.

I vote to oppose, at least, the adoption of any Plan A, and assert, since there is no other present remedy proposed, to adopt the method I have suggested. That is my opinion.

Judge Waterman: The order of the majority of the court is filed. We recess until such time as further motions bring us together.

APPENDIX D

July 13, 1965 Order of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 61–1559

WMCA, INC., R. PETER STRAUS, et al.,

Plaintiffs,

and

ANTHONY J. TRAVIA and JOSEPH ZARETZKI,

Plaintiffs-Intervenors,

—against—

JOHN P. LOMENZO, Secretary of State of the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York, et al.,

Defendants,

and

JOHN H. HUGHES and LAWRENCE M. RULISON,

Defendants-Intervenors.

Acting upon an application dated April 19, 1965 presented to us by the Attorney General of the State of New York, and after proceedings thereon in open court on May 10, 1965, and on May 24, 1965, this Court at the conclusion of the May 24, 1965 hearing filed in open court in the presence of counsel an order embodying the following mandates:

Appendix D—July 13, 1965 Order of District Court

"IT IS HEREBY ORDERED THAT:

"1. An election of members of the New York State Legislature shall be held on November 2, 1965, provided that the terms of the members so elected on that date or at any special election to fill vacancies, shall expire on December 31, 1966.

"2. Though the purported statute is itself presently ineffective, the scheme set forth in the Reapportionment Compliance Act, Chapter 976 of the Laws of 1964, together with such clerical corrections as have been certified to us by the Secretary of State pursuant to our order of May 10, 1965, in accord with the procedures set forth in § 403 of said ineffective Act, shall form the basis for the election of members of the New York State Legislature at the general election on November 2, 1965 and for any primary contest to nominate candidates for the Legislature or for any special election to fill vacancies prior to December 31, 1966. There is attached hereto and made a part hereof copies of the Act and the certified clerical corrections.

"3. Jurisdiction of further proceedings which may be found to be necessary in this Court is retained."

Notice of entry of this order was mailed to the attorneys for all parties on May 25, 1965, and on that day we denied an application filed on behalf of plaintiff-intervenors Anthony J. Travia and Joseph Zaretzki for a stay pending appeal of the order. The Supreme Court of the United States on June 1, 1965, one Justice dissenting, denied both

a motion to accelerate the hearing of the appeal and a motion to stay our order pending appeal.

Despite the foregoing, on or about June 22, 1965, one Frank J. Glinski and one William F. Keenan filed a suit in the Supreme Court of the State of New York, Albany County, seeking, among other things, an order restraining the Secretary of the State of New York from taking any action in obedience to our May 24, 1965 order.

On July 5, 1965, a Justice of that Court granted that prayer, and on July 9, 1965, after the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, on July 7, 1965 had unanimously reversed the lower court, the New York Court of Appeals reversed the Appellate Division and reinstated the Supreme Court Justice's injunctive order.

On July 9, 1965 application was then made to this Court for an order requiring Glinski and Keenan to show cause why they and all parties to this action should not be enjoined from interfering with the carrying out or execution of our order of May 24, 1965, and for other relief appropriate to effectuate said order, and

Now, after notice of said application, hearing thereon this day, and due deliberation:

IT IS HEREBY ORDERED THAT:

Frank J. Glinski, William F. Keenan, and all parties to this action, their agents, attorneys and servants, their successors and all other persons are hereby forever restrained and enjoined from interfering with the carrying out and execution by any and all New York State officers and elec-

tion officials and their successors and all other persons of the order of this Court of May 24, 1965.

Dated: July 13, 1965.

/s/ STERRY R. WATERMAN
United States Circuit Judge

/s/. SYLVESTER J. RYAN
United States District Judge

/s/ RICHARD H. LEVET
United States District Judge

APPENDIX E

Oral Opinions of District Court, July 13, 1965

Judge Waterman: First of all, we deny the motion of Messrs. Glinski and Keenan that the proceedings before us this day be dismissed.

Gentlemen, we have read the recent opinions of the judges of the New York Court of Appeals with great respect and with no little concern. We have great respect for the individual judges of that court as individual judges, and we share of course with the entire American judicature great respect for the court as a court.

We had thought that the order of this court of May 24, 1965, and the subsequent denial of a stay of this order by the United States Supreme Court, at last laid to rest all objections to this court's order mandating an election in the fall of 1965 of a new State Legislature to hold office for a term of one year.

We do note the statement of the chief judge of the New York Court of Appeals, however, that, and I quote, "Despite those illegalities of Plan A under which a 1965 election is supposed to be held, we would of course be obliged to respect and follow the federal court's orders that such an election be held this year if those courts had made final and binding orders therefore."

We intended the order of this court of May 24, 1965, to be exactly such an order, so directing. We believe the order did expressly state such a judgment, but to remove any question as to its purpose, intent or wording, we are entering a further order containing mandatory and injunctive provisions.

Appendix E—Oral Opinions of District Court, July 13, 1965

Judge Ryan: I concur with the statement now made by Judge Waterman.

Judge Levet: I concur with this statement.

I have heretofore expressed my opinion against the use of Plan A as the basis for the election to be held in November, 1965, although I have always approved of a 1965 election. However, the majority of this court has directed and has ordered the use of that plan, Plan A, in this year's election of the members of the Legislature for the year 1966. The United States Supreme Court has refused to stay such election on such a basis.

The election machinery of this state, as has already been indicated here this morning, has been implemented to the use of Plan A for the 1965 election. A shift at this time would create endless confusion.

Accordingly, I concur at least in the result directed by the statement made here by Judge Waterman, and I concur in the order which is this day made.

Judge Waterman: I would like to read the order which like the order before was read in court.

"Acting upon an application dated April 19, 1965, presented to us by the Attorney General of the State of New York, and after proceedings thereon in open court on May 10, 1965, and on May 24, 1965, this court at the conclusion of the May 24, 1965, hearing filed in open court in the presence of counsel an order embodying the following mandates:

> " 'It is hereby ordered that,
>
> " '1. An election of members of the New York State Legislature shall be held on November 2, 1965

provided that the terms of the members so elected on that date or at any special election to fill vacancies, shall expire on December 31, 1966.'

"'2. Though the purported statute is itself ineffective, the scheme set forth in the Reapportionment Compliance Act, Chapter 976 of the Laws of 1964, together with such clerical corrections as have been certified to us by the Secretary of State pursuant to our order of May 10, 1965, in accord with the procedures set forth in Section 403 of said ineffective Act, shall form the basis for the election of members of the New York State Legislature at the general election on November 2, 1965 and for any primary contest to nominate candidates for the Legislature or for any special election to fill vacancies prior to December 31, 1966.'

"There is attached hereto and made a part hereof copies of the Act and the certified clerical correction."

Counsel will recall that I handed the order with the Act attached to it and the corrections from the Secretary of State over the top of the bench and to the clerk.

Back to the order.

"'3. Jurisdiction of further proceedings which may be found to be necessary in this court is retained.'

"Notice of entry of this order was mailed to the attorneys for all parties on May 25, 1965, and on that day we denied an application filed on behalf of plaintiff-intervenors Anthony J. Travia and Joseph Zaretski for a stay pending appeal of the order.